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No. 829

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

R. L. BRADFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

R. L. BRADFORD,
In forma pauperis,
27 East 38th Street,
New York, N. Y.

INDEX

	PAGE
Opinion Below	1
Grounds on Which Jurisdiction is Invoked	2
Question Presented for Review	2
Constitutional Provisions Which the Case Involves	2
Statement of Case	2
Reasons Relied Upon for Issuance of Writ	4
Argument Amplifying the Reasons Relied Upon for Allowance of the Writ	5
Comment on Memorandum of Court Below	6
Conclusion	8
Memorandum of Court Below	9

Table of Cases

Cheetman v. Teets, 354 U. S. 156	7
Farley v. United States, 354 U. S. 521	7
Johnson v. Zerbst, 304 U. S. 458	4, 5
Johnson v. United States, 352 U. S. 565	4, 5
United States v. Morgan, 346 U. S. 502	7

Statute Cited

Article 28, United States Code, sec. 1915 (d)	6

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, R. L. Bradford, respectfully prays that a writ of certiorari issue to review the final decision of the United States Court of Appeals for the Second Circuit entered January 20, 1958, denying petitioner's motion for an order vacating an order of said Court dated and entered January 31, 1950, dismissing petitioner's appeal from a purported judgment of conviction rendered by the United States District Court for the Southern District of New York on December 12, 1949.

Opinion Below

The opinion of the Court of Appeals has not yet been officially reported and will be found appended to the original certified record of the proceedings filed concurrently herewith.

Grounds Upon Which Jurisdiction Is Invoked

The order sought to be reviewed was filed and entered on January 20, 1958. A petition for rehearing thereof was filed on February 3, 1958, and was denied, without opinion, on February 5, 1958. Jurisdiction is conferred upon this Court to review said order by writ of certiorari by Title 28, section 1254, United States Code.

Question Presented for Review

The question presented is:

Has a Court of Appeals power to dismiss an appeal from a purported judgment of conviction of a district court upon the appellant's application to proceed *in forma pauperis;* to appoint counsel and to extend time to docket the record on appeal, without first appointing counsel to assist him upon such application?

Constitutional Provisions Which the Case Involves

The Sixth Amendment to the Constitution of the United States provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

Statement of the Case

On December 2, 1949, an indictment was filed in the United States District Court for the Southern District of New York purporting to charge petitioner with a violation of section 1241, Title 18, United States Code.

Shortly after the commencement of the trial, petitioner was coerced by a court-appointed attorney who had never been admitted to practice law in any federal court to

plead guilty to said indictment notwithstanding that it charged no offense against the laws of the United States.

On December 12, 1949, sentence, now completely served, was pronounced. On December 21, 1949, petitioner duly filed a notice of appeal therefrom.

On or about January 15, 1950, petitioner, upon the advice of the Clerk of the court below, duly filed therein an application to proceed *in forma pauperis;* to extend time within to docket the record on appeal; and to appoint counsel to assist him in the prosecution thereof.

Said application appeared on the motion calendar of said Court on January 30, 1950, and on that day it was adjourned to January 31, 1950. Petitioner was not present on either of said days for the reason that he was then incarcerated under said judgment.

Notwithstanding the foregoing, said Court, on January 31, 1950, filed the following order in the office of its Clerk:

> "A motion having been made herein by appellant *pro se* for leave to proceed *in forma pauperis;* to extend the time to prosecute the appeal; and to appoint counsel,
>
> And an oral cross-motion having been made herein by counsel for appellee,
> Upon consideration thereof, it is
> Ordered that the appeal herein be and it hereby is dismissed."

The appeal was dismissed upon said oral cross-motion without notice to petitioner while he was helplessly incarcerated; and notwithstanding that said oral cross-motion was in violation of Rule 19 (a) of the Rules of said Court which requires that all motions must be upon four days' notice in writing.

As the above order shows upon its face, petitioner was without counsel. Under the handicap of imprisonment, he filed said notice of appeal and said application to proceed *in forma pauperis* himself in order to save his right to appeal until counsel could be appointed for him as the Sixth Amendment requires.

Though petitioner's application specifically asked said Court to appoint counsel for him, it did not do so. Instead, it arbitrarily dismissed his appeal upon an oral cross-motion without notice, and without ascribing any reasons therefor whatsoever.

On January 6, 1958, petitioner duly moved said Court of Appeals for an order vacating said order dismissing said appeal upon the grounds that said Court had failed to appoint counsel to assist him in his application to proceed *in forma pauperis,* that therefore it lost jurisdiction, and that its order of dismissal was void. This motion was based upon this Court's mandate in *Johnson* v. *United States,* 352 U. S. 565, decided March 4, 1957.

On January 20, 1958, said motion was denied. On February 3, 1958, petitioner filed a petition for rehearing which was denied on February 5, 1958.

Reasons Relied Upon For the Issuance of the Writ of Certiorari

The Court of Appeals summarily dismissed said appeal without first appointing counsel to assist petitioner therein.

In so doing, it wholly disregarded *Johnson* v. *Zerbst,* 304 U. S. 458, directing federal courts to provide counsel at every stage of the proceedings.

It also wholly disregarded the following mandate of *Johnson* v. *United States,* 352 U. S. 565:

"Moreover, a Court of Appeals must, under *Johnson* v. *Zerbst*, 304 U. S. 458, afford one who challenges that certification the aid of counsel unless he insists on being his own."

It is apparent that said Court of Appeals in denying said motion to vacate "has decided a federal question in a way in conflict with the applicable decisions of this Court."

It is also apparent that said Court in denying said motion "so far departed from the accepted and usual course of judicial proceedings • • • as to call for an exercise of this Court's power of supervision" (Rule 19 (b)).

Argument Amplifying the Reasons Relied Upon for Allowance of the Writ

This Court held in *Johnson* v. *Zerbst*, 304 U. S. 458, that a defendant in a criminal prosecution was, under the Sixth Amendment, entitled to the assistance of counsel at every stage of the proceedings against him; that it was the duty of a federal court to appoint counsel where he had none; and that, where it failed to do so, it lost jurisdiction of the proceedings which therefore became void.

Here, petitioner was admittedly without the assistance of counsel upon his application to proceed *in forma pauperis*. Furthermore, he specifically asked said Court to provide counsel for him. It did not do so. Instead it arbitrarily dismissed the appeal upon an oral cross-motion without notice contrary to its own Rules; and without ascribing any reason therefore whatsoever.

In so doing, said Court lost jurisdiction, and its order of dismissal was therefore void.

Said Court not only disregarded the mandate of *Johnson* v. *Zerbst, supra;* but the more recent mandate of *Johnson*

v. *United States*, 352 U. S. 565, specifically holding that a Court of Appeals MUST, upon a *forma pauperis* application, provide the appellant with the assistance of counsel.

Since, for the foregoing reasons, the order of the court below dated January 31, 1950, dismissing said appeal was and is void for want of jurisdiction, it should be vacated.

Comment on Memorandum of Court Below

The Court of Appeals, in denying petitioner's motion to vacate, filed a Memorandum.

It held that petitioner's appeal was properly dismissed under section 1915 (d) of Article 28, United States Code, because "a reading of the indictment demonstrates that also frivolous was the contention that the conviction which had been entered on a plea of guilty * * * was invalid because the indictment failed to charge an offense."

The Court's Memorandum was based largely upon a false and perjurious affidavit of an Assistant United States Attorney. This was called to the Court's attention in petitioner's Petition for a Rehearing, but without avail.

Though the validity of the indictment is not at issue in this proceeding, it may be mentioned that petitioner was never afforded an opportunity to show any federal court that it did not charge an offense against the laws of the United States, notwithstanding that there are many cases of this, and other federal courts, including the court below, holding that the indictment does not charge an offense.

The Court's Memorandum clearly indicates, that it misconceived the point and purpose of petitioner's motion to vacate.

Petitioner's motion did not submit any issue as to whether he was guilty or innocent; or whether the indictment did or did not charge an offense; or whether the

appeal was or was not frivolous; or any other such foreign issue.

This, obviously, he could not do because there never was any duly authenticated record before the Court upon which to base such a determination even if petitioner, at such time, had desired it (*Farley* v. *United States*, 354 U. S. 521).

His sole contention, as the record here indisputably shows, was that, since said Court did not appoint counsel to assist during the appellate proceedings, it lost jurisdiction and its order of dismissal was void.

All other extraneous references in the Memorandum to guilt, plea, indictment, merits, frivolity, the "history" of prior proceedings, etc., have no relevancy whatsoever to the sole issue involving an order void for want of jurisdiction because made in violation of a constitutional right.

See:

United States v. *Morgan*, 346 U. S. 502;
Chessman v. *Teets*, 354 U. S. 156.

On the sole issue of the void order, the Court of Appeals had nothing to say whatsoever.

The Court stated that *Johnson* v. *United States, supra*, did not apply because petitioner pleaded guilty though the record herein indisputably shows that such plea was coerced.

A guilty plea is not, and could not be, material where the court has lost jurisdiction because of its failure to provide counsel (*United States* v. *Morgan, supra*).

The purpose of the appeal was to determine whether petitioner had been legally convicted by plea, or otherwise, and such determination could not be precluded by the Court of Appeals' unfounded assumption, without a hearing and without a record, that he had been. That would be putting the cart before the horse.

Conclusion

It is respectfully submitted that since the Court of Appeals dismissed said appeal upon an oral cross-motion made contrary to it Rules, without notice to petitioner, without a hearing, and without providing petitioner with the assistance of counsel which, consequently, rendered said order void for want of jurisdiction, that this petition for a writ of certiorari should be granted.

Respectfully submitted,

R. L. Bradford,
In forma pauperis,
27 East 38th St.,
New York, New York.

APPENDIX

Memorandum of Court Below.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 21587

UNITED STATES OF AMERICA

Appellee,

v.

ROBERT L. BRADFORD,

Appellant.

Before:

HINCKS and WATERMAN, Circuit Judges.

MEMORANDUM AND ORDER ON
MOTION TO VACATE DISMISSAL OF APPEAL

Our order of January 31, 1950 dismissing the appeal,* which movant [defendant] now asks us to vacate, was properly entered, we hold, under 28 U.S.C.A. § 1915(d). The contention that the mail fraud statute, 18 U.S.C.A. § 1341, under which on his plea of guilty the defendant had been convicted, was unconstitutional, in the light of *Badders* v. *United States,* 240 U. S. 391, was frivolous. And a reading of the indictment demonstrates that also frivolous was the contention that the conviction which had been entered on a plea of guilty when the defendant was represented by competent counsel,** was invalid because

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* This was a direct appeal from a conviction for mail fraud.

** 112 F. Supp. 915, appeal dismissed for lack of prosecution Oct. 20, 1955; 238 F. 2d 395, cert. den. 352 U. S. 1002.

the indictment failed to charge an offense. That the conviction was not erroneous, and that the appeal was frivolous, further appears from the transcript of proceedings before the trial court on December 7, 1949, which shows that before accepting the defendant's plea of guilty the judge in open court inquired of the defendant if his plea was "completely voluntary" to which the defendant replied in the affirmative.

On December 8, 1953 the defendant, through his counsel, filed in this court a petition to vacate the dismissal of January 31, 1950. On December 17, 1953, the court by Judges Clark, Frank and Hincks disposed of this petition saying: "The judgment of this court of January 31, 1950, being within its authority, 28 U.S.C. § 1915(d), the petition to vacate it is denied." Certiorari was denied. 347 U. S. 945.

On September 20, 1955, Judge Ryan denied without opinion a writ of error *coram nobis* disposing of the contentions that the defendant's plea of guilty was not voluntary, that the indictment did not charge an offense, and that because his court-appointed counsel was not a member of the bar of the court below, he had not been represented by counsel. His order was affirmed. 238 F. 2d 395, cert. den. 352 U. S. 1002.

It is now urged that our dismissal of the appeal in 1950 was erroneous under the rule since enunciated in 1957 in *Johnson* v. *United States,* 352 U. S. 565, and in *Farley* v. *United States,* 354 U. S. 521. But those were not cases like this in which the conviction rested upon a voluntary plea of guilty and in which the utter lack of merit of the grounds of appeal was determined solely from the face of the record.

We hold, therefore, that our order of dismissal of January 31, 1950 was not within the purview of the *Johnson* and the *Farley* cases. The appeal then pending was

so obviously frivolous that it was subject to summary dismissal by the court, *sua sponte*, 28 U.S.C.A. § 1915(d). And the movant now shows no just ground for vacating that order.

The order to vacate is denied by Judges Hincks and Waterman, Judge Lumbard not participating.

.....

.....

C.JJ.

January 20, 1958

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PETITIONER'S REPLY BRIEF

R. L. BRADFORD,
27 East 38th Street,
New York, N. Y.

INDEX

PAGE

The Indictment 4

CASES CITED

Chessman v. Teets, 354 U. S. 154 2

Farley v. United States, 354 U. S. 521 2

Johnson v. United States, 352 U. S. 565 .....1, 2, 3

United States v. Morgan, 346 U. S. 502 ..... 2, 3

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PETITIONER'S REPLY BRIEF

The present proceeding is not, as claimed by respondent, one "to reopen," but to vacate, as void, the order of the court below dismissing his appeal upon the grounds that petitioner was not afforded the assistance of counsel upon his application to proceed *in forma pauperis* as required by the sixth amendment as construed and applied by this Court in *Johnson* v. *United States*, 352 U. S. 565.

Respondent's reasons for denying the present Petition appear to be the following:

1. That the Court of Appeals stated in this proceeding that the appeal was frivolous.

That court gave no such reason when the appeal was dismissed; nor was there any duly authenticated record then, or at any other time, before said court upon which such a finding could be made.

Therefore, respondent's contention is contrary to *Farley* v. *United States,* 354 U. S. 521.

2. That various collateral attacks have been made by petitioner upon the judgment.

None of these efforts were upon the grounds here presented; and they are, therefore, immaterial.

Furthermore, respondent's contention is contrary to *Chessman* v. *Teets,* 354 U. S. 156.

3. That petitioner pleaded guilty.

If the indictment charged no offense, as claimed, petitioner could not plead guilty to anything but a lawful act. Such plea could not convert an indictment that charged no offense into one that does.

Moreover, if the proceedings in the federal court were void for any reason, the plea was void also as this Court has held many times, and particularly in *United States* v. *Morgan,* 346 U. S. 502.

4. That *Johnson* v. *United States,* 352 U. S. 565, *supra,* does not apply because lack of merit was determined solely from the record.

The so-called "record" is a myth. There never was, and never has been, any authenticated record before said Court of Appeals; and to determine the question of frivolity without a record is contrary to *Farley* v. *United States,* 354 U. S. 521, *supra.*

"Lack of merit" is a myth also because merit could not be determined without a record. Petitioner's motion included a request for an extension of time to docket the record, and if no record had been docketed there could have been none before the court.

5. That petitioner "did not apply to the Court of Appeals for appointment of an attorney until his time to docket the appeal had almost expired."

This is an admission by respondent that no record had yet been docketed, and that therefore there was no record before the court upon which it could determine the question of frivolity.

Furthermore, is an appellant to be denied the constitutional right to the assistance of counsel in a *forma pauperis* proceeding because, within the time allowed by law to docket, he asks for an extension of time therefor?

It may be said, also, that during such time petitioner was imprisoned, was without counsel, and was doing the best he could under the circumstances. His purpose in asking for counsel was to relieve himself of these disabilities.

6. That petitioner seeks to "reopen" the proceedings eight years after sentence has been fully served.

This is not a case of "reopening" a valid order, as respondent pretends, but of vacating a void one.

A void judgment may be vacated after the lapse of any time, and after sentence has been served, because of the continuing disability thereof, as this Court has specifically held in *United States* v. *Morgan, supra.*

In *Johnson* v. *United States, supra,* this Court made no exceptions or qualifications whatsoever as to an appellant's right to have the assistance of counsel in a *forma pauperis* proceeding.

If the same kind of an order of this same court was void in the *Johnson* case, it is void here.

It is respectfully submitted that the administration of justice in the federal courts is in jeopardy when the lower courts refuse or fail to follow the specific mandates of this Court.

The Indictment

Though the merits are not at issue in this proceeding, there are many decisions of this Court, and the lower federal courts, including the court below, holding that the indictment here does not charge an offense against the laws of the United States.

In such case, the indictment, the plea and judgment are void.

Petitioner has never been afforded an opportunity by any federal court to show that said indictment charged no offense, or to offer said decisions.

Instead, he was arbitrarily denied that right by said Court of Appeals while he was imprisoned, and without counsel, upon an oral cross-motion made without notice contrary to the Rules of said court and elemental principles of justice, and without any record then before the court upon which it could base any determination as to frivolity because, admittedly, the record had not yet been docketed.

This Court has held repeatedly that no one can be deprived of a right without notice and opportunity to be heard.

Respondent's contentions are themselves frivolous, and are unworthy of representatives of the Government of the United States.

It is, therefore, respectfully submitted that the Petition for a Writ of Certiorari should be granted.

R. L. Bradford,
In propria persona
27 East 38th St.,
New York, N. Y.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	4
Conclusion	5

CITATIONS

Cases:	
Farley v. *United States*, 354 U. S. 521	4
Johnson v. *United States*, 352 U. S. 565	4
United States v. *Morgan*, 346 U. S. 502	3
Statute:	
28 U. S. C. 2255	3

In the Supreme Court of the United States

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No. 829

R. L. BRADFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals on petitioner's motion to reopen the dismissal of his appeal in 1950 (Pet. App. 9–11) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered January 20, 1958. A petition for rehearing was denied on February 5, 1958. The petition for a writ of certiorari was filed on March 4, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Court of Appeals, which had in 1950 dismissed petitioner's appeal from a judgment entered on a plea of guilty, was required to reopen the proceeding in 1958, after sentence had been served, because counsel had not been assigned to prosecute the appeal.

STATEMENT

In December 1949, during a trial for mail fraud in the United States District Court for the Southern District of New York, petitioner, who was represented by counsel, pleaded guilty to four counts charging mail fraud violations. He was sentenced to concurrent terms of imprisonment of one year and one day on counts 1 and 2, and to three years probation on counts 3 and 4 to commence upon expiration of his term of imprisonment. He filed a notice of appeal to the Court of Appeals on December 21, 1949. On January 20, 1950, petitioner filed in the Court of Appeals a motion for leave to proceed in forma pauperis, for an extension of time within which to docket the record on appeal, and for appointment of counsel. He alleged that the indictment did not charge an offense and that the mail fraud statute was unconstitutional. When the motion came up on the calendar, the United States attorney made an oral cross-motion for dismissal of the appeal. On January 31, 1950, the Court of Appeals entered an order stating that, upon consideration of petitioner's motion and the oral cross-motion, it is "Ordered that the appeal

herein be and it hereby is dismissed" (Pet. 3).[1] In this proceeding, the Court of Appeals has stated that the appeal was dismissed as frivolous.

In 1953, petitioner, through counsel, sought to have the dismissal of the appeal vacated, arguing that he had not received notice of the oral motion of the United States attorney. That application was denied and a petition for a writ of certiorari was denied by this Court. 347 U. S. 945 (No. 399 Misc., O. T. 1953).

Petitioner also made various collateral attacks upon the judgment. A petition for a writ of habeas corpus, and a motion under 28 U. S. C. 2255, brought after petitioner had served the imprisonment part of his sentence, were dismissed for lack of jurisdiction. 185 F. 2d 1021; 194 F. 2d 197. Subsequent to the decision of this Court in *United States* v. *Morgan*, 346 U. S. 502, petitioner was granted a hearing on an application for a writ of *coram nobis*. His contentions therein, which, *inter alia*, attacked the competency of court-appointed counsel, were found to be without merit. 122 F. Supp. 915, appeal dismissed for lack of prosecution. A second coram nobis petition was denied without a hearing, and the ruling of the court was affirmed on appeal. 238 F. 2d 395, certiorari denied, 352 U. S. 1002.

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[1] The record of the proceedings at that time and on a subsequent motion to vacate the order of dismissal is on file in this Court in No. 399 Misc., O. T. 1953.

The present proceeding was another application by petitioner to the Court of Appeals to vacate the 1950 dismissal of the appeal. Petitioner argued that, under the rulings of this Court in *Johnson* v. *United States,* 352 U. S. 565, and *Farley* v. *United States,* 354 U. S. 521, reopening was required since counsel had not been assigned to him. The Court of Appeals held that its order of dismissal was not within the purview of these cases since here the conviction rested upon a voluntary plea of guilty and the lack of merit of the appeal was determined solely from the face of the record.

ARGUMENT

There is no merit in petitioner's argument that the dismissal of his appeal in 1950 had to be reopened under the rulings of this Court in *Johnson* v. *United States,* 352 U. S. 565, and *Farley* v. *United States,* 354 U. S. 521. Petitioner did not seek counsel in the district court and did not apply to the Court of Appeals for appointment of an attorney until his time to docket the appeal had almost expired. He coupled that application with a motion for extension of time to docket the record. In the face of the utter frivolity of his contentions, which attacked a conviction resting on a voluntary plea of guilty during trial, the Court of Appeals was not required to grant him the grace of an extension of time and appoint an attorney to prosecute an untimely appeal. *A fortiori* it was not required to reopen the proceedings eight years later when petitioner's sentence had been fully served.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
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MALCOLM ANDERSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

MARCH 1958.

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